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Judgement Reserved In Frazer Solar Case

By **Sunday Express** On **Nov 12, 2022** **NEWS** **LOCAL**

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The High Court has reserved judgement in the government's application to overturn a South African arbitrator's £50 million (M856 million) damages award to Frazer Solar.

The 2019 damages award was for the alleged breach of a 2018 contract the German company claims to have entered into with the previous Thomas Thabane-led government for the supply of solar power to Lesotho.

The matter was heard on Thursday and Friday by three judges including, Chief Justice Sakoane Sakoane, who then reserved judgement to an unspecified date.

Justices Moroke Mokhesi and Realeboha Mathaba were the other judges on the panel.

Frazer Solar had in April 2021 successfully petitioned the Gauteng High Court to endorse the award and allow it to garnish Lesotho's revenue from the sale of water to South Africa in terms of the Lesotho Highlands Water Project treaty entered into by the two countries in 1986.

However, outgoing Prime Minister Moeketsi Majoro petitioned the same court to reverse its decision. The case is pending in that court. Dr Majoro also petitioned Lesotho's High Court to reverse the award.

In his 21 September 2021 application filed in the Lesotho High Court, Dr Majoro argues that the contract is not valid as it was "fraudulently and corruptly" signed by then Minister in the Prime Minister's Office, Temeki Tšolo, who had no powers to sign.

Mr Tšolo has previously denied signing the deal on behalf of the government.

However, Dr Majoro insists that he signed and, in the process, violated national laws which stipulate how such contracts are agreed and how payments to third parties are made.

He accuses the former minister of acting outside his powers by "clandestinely" signing the agreement without the knowledge and approval of parliament, cabinet and himself as the finance minister at the time. He further argues that the deal should have been negotiated and signed by the Ministry of Energy and Meteorology, not by Mr Tšolo.

When the matter was heard on Thursday and Friday, the government was represented by a legal team comprising of South African lawyers, Steven Budlender and Nick Ferreira and local heavyweights, Motiea Teele and Qhalehang Letsika.

Frazer Solar was represented by the South African duo of Advocates Pearce Rood and Frank Pelser.

Adv Budlender argued that Mr Tšolo and Frazer Solar were aware from the start that they had entered into an illegal contract.

"There are three reasons why the Frazer Solar deal cannot stand," Adv Budlender argued.

"Firstly, there is a clear and substantial breach of the law. Secondly, no implementation has taken place as nothing has been delivered to Lesotho. Lastly, the arbitration award has a negative impact on the public as the €50 million is a disastrous five percent of the national budget.

"It is difficult to understand why an agreement tainted with such irregularities should stand. We pray that the supply agreement and the arbitration clause be reviewed and set aside by the court as being unlawful. When they signed, they were aware that they were in breach of the warrantee clause which required that there should be a loan to finance the deal."

Adv Budlender argued that the procurement regulations were not met and therefore the contract, together with the clause providing for arbitration in the event of a dispute between the government and Frazer Solar, stood to be nullified.

"The Procurement Regulations (Amendment), 2018 clearly stipulate that goods and services above M100 000 should be subjected to open tenders but in this case none of the procurement requirements were satisfied.

"It is true that the regulations allow selective tendering when there is an emergency but nothing necessitated that in this instance.

"No proper authority warranted this agreement; that is the Ministry of Finance or Energy. There can be no doubt that the absence of the procurement policy renders this agreement unlawful. They try to avoid the law by saying it had great benefits for Lesotho.

"Section 28 of the Public Finance Management Act requires the Minister of Finance, who was Majoro at that time, to approve borrowing with the consent of the cabinet. This was also not complied with and therefore the agreement was unlawful. This agreement had to be signed by Majoro not Tšolo but there was a desperate attempt to keep it away from Majoro. Tšolo signed without the consent of Majoro or cabinet," Adv Budlender argued.

On the other hand, Adv Rood conceded that procurement rules had not been followed when his client was 'awarded' the tender by Mr Tšolo.

Despite this, he still insisted that Mr Tšolo had been authorised by the Thabane administration to act on behalf of the then government.

He said even if the Lesotho High Court were to nullify the supply agreement, it had no jurisdiction to adjudicate and overturn the arbitration award as this had been endorsed by the Gauteng High Court in April 2020.

"Tšolo was statutorily authorised to act in terms of the Government Proceedings Act and therefore that contract is valid. The prime minister at that time (Thabane) wanted matters to be dealt with in this fashion. In terms of the arbitration agreement, there is no specific minister assigned to sign on behalf of the government. We do accept that the procurement laws were not followed but my client says he thought everything was done correctly.

"The court may set aside the supply agreement but that has no bearing on the arbitration order. The appropriate court where the arbitration dispute should be argued is in South Africa. The New York Convention, which Lesotho signed, applies as a mechanism to resolve international disputes through arbitrations. The arbitration is a separate agreement from the procurement one. The New York Convention applies because it is an agreement between the Kingdom and a company from outside this jurisdiction," Adv Rood argued.

He also argued that Dr Majoro was aware of the supply agreement. If at all he was unhappy with it, he should have acted immediately after becoming prime minister in May 2020. He had therefore delayed to institute his case, Adv Rood argued.

"It is unquestionable that Majoro knew about the supply agreement in 2018, therefore the applicant delayed to institute these proceedings. At the very least, he should have acted when he became prime minister in May 2020. He had an obligation to facilitate the loan. The failure to do so is a breach of contract.

"The delay is so extreme, it renders these proceedings moot because the arbitration award has already been issued. It has already been three years and therefore the delay is not properly being advanced," Adv Rood argued.

After hearing both sides, the court then reserved judgement to a date yet to be announced.

"Judgement is reserved and you will be notified when it is ready. The court will take time to consider the submissions made. However, we will deliver judgement within a reasonable time," Justice Sakoane said.

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